COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 95-1531

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ALBERT TROSTEL & SONS COMPANY AND
ALBERT TROSTEL PACKINGS, LTD.,

PLAINTIFFS-APPELLANTS,

V.

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY,
ALLSTATE INSURANCE COMPANY,
SENTRY INSURANCE,
A MUTUAL COMPANY AND
NORTHWESTERN NATIONAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. This is the second time this court has considered this case. Albert Trostel & Sons Company and Albert Trostel Packings, Ltd. (collectively "Trostel") appealed from trial court judgments granting summary judgment to Employers Insurance of Wausau, Allstate Insurance Company, Sentry Insurance, and Northwestern National Insurance Company. Trostel claimed that: (1) the trial court erred in concluding that the insurers did not have a duty to defend or indemnify Trostel relating to claims for remediation for pollution which occurred at eleven separate landfill sites; (2) the insurance companies breached their duty to defend and therefore were estopped from contesting coverage;[1] (3) choice of law principles precludes the application of Wisconsin law; and (4) it was entitled to costs it incurred to defend the case up until the point in time when the coverage issue was decided. We affirmed in an unpublished opinion.

Trostel filed a petition for review, which was granted. The supreme court vacated our original decision and remanded the case to us to reconsider in light of its recent decision, ***General Casualty Co. v. Hills***, 209 Wis.2d 167, 561 N.W.2d 718 (1997). Having reconsidered Trostel's claims in light of ***General Casualty***, we reverse the summary judgment granted to Allstate and Sentry with respect to one site–the West KL site. We must reverse this portion of the judgment because the law set forth in ***Hills*** compels the conclusion that the West KL site involved a suit for damages as those terms are used in the insurance policies at issue. Because the remaining ten sites did not involve a "suit" or, if a

[1] Trostel also alleged that even if the insurers are not obligated to defend it, the insurers were obligated to indemnify Trostel because the policy language relating to indemnification was broader than the policy language relative to defense. We rejected this argument. It is long-standing law in this state that the duty to defend is broader than the duty to indemnify. *See* ***Sola Basic Indus., Inc. v. U.S. Fidelity & Guar. Co.***, 90 Wis.2d 641, 280 N.W.2d 211 (1979). Therefore, if there is no duty to defend, there is no duty to indemnify. *See, e.g.,* ***EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co.***, 905 F.2d 8, 11 (2d Cir. 1990).

suit was involved, it did not involve "damages," as required by ***City of Edgerton v. General Casualty Co.***, 184 Wis.2d 750, 517 N.W.2d 463 (1994), we affirm the remainder of the judgments granted to Allstate, Sentry, Wausau and Northwestern National.

Further, because the West KL site involved a suit for damages, we hold that Allstate and Sentry breached their duties to defend Trostel with respect to the suit involving the West KL site and, as a result of that breach, the insurers have waived their right to contest coverage and must pay for the damages Trostel incurred in settling and defending itself from the suit relating to the West KL site. In sum, we reverse the judgment in part, affirm in part and remand with instructions to the trial court to determine the proper award that the insurers must pay to Trostel.[2]

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[2] In our original opinion, we concluded that Wisconsin law applies. We provided the following analysis:

> Trostel argues that Michigan law should apply because many of the sites were located in Michigan; or that Illinois law should apply because Allstate is headquartered in Illinois. The trial court rejected Trostel's choice of law arguments. We must do the same.
>
> In engaging in a choice of law analysis, we begin with the premise that the law of the forum state generally governs, especially when the forum is chosen by the insured. ***Hunker v. Royal Indem. Co.***, 57 Wis.2d 588, 598-600, 204 N.W.2d 897, 902-03 (1973). This presumption applies unless non-forum contacts are of greater significance. ***Id.***
>
> In the instant case, the insured, Trostel, chose Wisconsin circuit court as the forum for resolution of this case. It is undisputed that Trostel is a Wisconsin corporation. It is undisputed that Wausau, Northwestern National and Sentry are Wisconsin corporations. Moreover, although Allstate is headquartered in Illinois, it engages in substantial business in Wisconsin. It is also undisputed that all of the contaminated sites for which Northwestern National is allegedly responsible are located in Wisconsin and that three of the four sites attributed

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I. BACKGROUND

Trostel filed suit in the Milwaukee County Circuit Court seeking damages for breach of contract and a declaration that Employers, Allstate, Sentry, and Northwestern National are obligated to defend and indemnify Trostel for costs it incurred, or will incur, with respect to environmental contamination caused by Trostel at eleven separate sites. Seven of the eleven sites at issue did not involve a "suit." These included:

> (1) Commerce Street site in Milwaukee, Wisconsin. This site, which was formerly owned by Trostel, was sold to the state. When the state tried to sell the property, it discovered soil and groundwater contamination. By letter dated January 25, 1989, the Wisconsin Department of Administration notified Trostel of the contamination. Trostel agreed to purchase the property from the state and remediate the site. No lawsuit was ever filed against Trostel relating to the contamination at this site.

> to Wausau are located in Wisconsin. Further, Trostel alleged in its complaint that the policies were sold, issued and delivered in Wisconsin.
>
> Based on all of these factors, as well as the fact that the issue in this case is the scope of insurance coverage, the fact that many of the sites are located outside of Wisconsin is not of great significance. *See* ***American Family Mut. Ins. Co. v. Powell***, 169 Wis.2d 605, 609-10, 486 N.W.2d 537, 538-39 (Ct. App. 1992) (if contract of insurance has significant contact with Wisconsin, Wisconsin law will apply even if events giving rise to liability occurred in other states).
>
> The record demonstrates that the insurance contracts at issue in this case have significant contact with Wisconsin. The insured was a Wisconsin corporation. The insurers (with the exception of Allstate) were Wisconsin corporations. The policies were negotiated, sold, issued and delivered to Trostel in Wisconsin. We conclude that any choice of law analysis decidedly favors choosing Wisconsin law as the law applicable to this case.

We have not changed our minds regarding this conclusion.

(2) Thermo-Chem, Inc./Thomas Solvent Superfund site in Muskegon, Michigan. Trostel received a "PRP" letter dated June 4, 1986, from the EPA regarding this site.[3] After a study of the site was conducted, the EPA issued a Record of Decision, which set forth its position as to what type of remediation was required to clean up the site. In May 1992, the EPA issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability act (CERCLA), 42 U.S.C. § 9601, *et al*, directing that the Record of Decision be implemented. No lawsuit was filed against Trostel relating to this site.

(3) Organic Chemical Superfund site in Grandville, Michigan. In April 1991, the EPA advised Eagle Ottawa in a PRP letter regarding contamination discovered at this site. Eagle Ottawa is an unincorporated division of Trostel. No lawsuit was ever filed.

(4) Four County Landfill site in Fulton County, Indiana. Eagle Ottawa received a PRP letter regarding this site from the Indiana Department of Environmental Management. No lawsuit was ever filed.

(5) Lake Geneva site in Lake Geneva, Wisconsin. Trostel discovered contamination at this site and notified the Wisconsin Department of Natural Resources. The DNR responded by letter advising Trostel of its responsibility to clean up the contamination pursuant to Wisconsin statute. No lawsuit was ever filed.

(6) Grand Haven Brass site in Grand Haven, Michigan. Eagle Ottawa reported contamination at this site to the EPA and the Michigan DNR. It stated its intention to remediate the site and clean up the hazardous waste. No lawsuit was ever filed.

(7) Marina Cliffs Barrel site in South Milwaukee, Wisconsin. The Wisconsin DNR sent Trostel a PRP letter regarding this site. No lawsuit was ever filed.

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[3] A "PRP" letter is a notification by a federal or state environmental agency to a **p**otentially **r**esponsible **p**arty of an environmentally contaminated piece of property. The letter identifies the recipient as a potentially responsible party and gives the PRP three options: "(1) do nothing and wait for the government to recover the costs of the cleanup; (2) clean up the affected site or join with other PRPs to effect a cleanup; or (3) litigate with the government so as to possibly secure a more favorable future result." *See* ***City of Edgerton v. General Cas. Co.***, 184 Wis.2d 750, 757 n.4, 517 N.W.2d 463, 467 n.4 (1994).

The remaining four sites did involve actual "suits." These included:

> (1) West KL Avenue Landfill Superfund site in Kalamazoo, Michigan. This site did involve a lawsuit by the EPA against certain potentially responsible parties. Eagle Ottawa was not named as an original defendant in this case. Rather, the PRPs filed a third-party complaint against Eagle Ottawa, naming it as a third party defendant. The claim against Eagle Ottawa was based on its alleged liability for response costs under CERCLA.
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> (2) Berlin and Farro site in Swartz Creek, Michigan. This site did involve a lawsuit brought by the United States and the State of Michigan pursuant to the provisions of CERCLA. Consent decrees required Eagle Ottawa to fund and/or conduct certain response activities at the site. Eagle Ottawa was sued directly by government agencies.
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> (3) A-1 Disposal site in Plainwell, Michigan. The Michigan DNR sued Eagle Ottawa for contamination at this site. The complaint sought recovery of past response costs and an injunction requiring remediation at the site. Eagle Ottawa was sued directly by government agencies to recover past response activity costs relating to the release of hazardous substances.
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> (4) Sunrise Landfill site in Allegan County, Michigan. This site involved a lawsuit similar to the lawsuit regarding the A-1 site. Eagle Ottawa was sued directly by government agencies to recover past response activity costs related to release of hazardous substances.

Trostel, a Wisconsin corporation, had secured comprehensive general liability insurance polices and umbrella policies for work it performed at each of these sites. Trostel alleged that Northwestern National provided coverage for the Commerce Street, Lake Geneva and Marina Cliffs sites.[4] Trostel alleged

[4] The pertinent policy language under Northwestern National's policy provided:

> Insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of … property damage …, and [the insurer] shall have the right and duty to defend any suit against the insured seeking damages on account of such … property damage.

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that Wausau provided coverage for the Commerce Street, Organic Chemical, Lake Geneva and Marina Cliffs sites.[5] Sentry and Allstate allegedly provided coverage for the remaining sites, i.e., Thermo-Chem, Inc., West KL, Four County Landfill, Berlin and Farro, Grand Haven Brass, A-1, and Sunrise Landfill.[6]

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[5] The Wausau policies granting primary coverage provide in pertinent part:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A. Personal injury or
>
> Coverage B. Property Damage
>
> to which this policy applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury or property damage.

The Wausau policy granting excess coverage provides in pertinent part:

> I. COVERAGE. To pay on behalf of the insured all sums which the insured shall become obligated to pay, either by adjudication or compromise, by reason of the liability imposed upon the insured by law or assumed by the insured under any contract for damages because of personal injury and property damage.

[6] The Allstate policies granting primary coverage provide in pertinent part:

> Allstate will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of … property damage … to which this insurance applies, … and Allstate shall have the right and the duty to defend any suit … seeking damage on account of such … property damage.

The Allstate umbrella policies at issue provide:

> Allstate will indemnify the Insured for all sums which the Insured shall be legally obligated to pay as ultimate net loss because of … property damage.
>
> "Ultimate net loss" means the sum actually expended or payable in cash to procure settlement or satisfaction of the Insured's legal

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The insurers filed motions for summary judgment. The trial court, applying Wisconsin law, granted the insurers' motions for summary judgment finding that none of the eleven sites involved "suits for damages" as those terms are used in the comprehensive general liability policies as interpreted by ***Edgerton***. Trostel appealed to this court from the judgment. As noted, we affirmed, but our original decision was vacated by our supreme court and the case was remanded to us to reconsider in light of the supreme court's decision in ***Hills.***

II. DISCUSSION

Our standard of review of summary judgments is *de novo*. *See* ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis.2d 131, 140, 513 N.W.2d 609, 613 (Ct. App. 1994). Moreover, interpretation of an insurance policy is a question of law that this court decides independently of the trial court. *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990).

> obligation for damages either by (1) final adjudication or (2) compromise with the written consent of Allstate.

The Sentry policies provide in pertinent part:

> The company, hereby agrees to indemnify the insured for all sums which the insured shall be obligated to pay by reason of liability for damages imposed upon the insured by law or assumed under any contract, if such liability results from personal injury, property damage or advertising injury to which this policy applies, caused by an occurrence.
>
> The Company also agrees to indemnify the insured for all reasonable expenses incurred by the insured in connection with the investigation, negotiation, adjustment, settlement and defense of any claims or suits alleging personal injury, property damage or advertising injury and covered by this policy.

A. ***Edgerton*** *Case and* ***General Casualty*** *Case Application.*

In this court's original decision, we concluded that the trial court properly granted summary judgment to the insurers based on the ***Edgerton*** case. In ***Edgerton***, the Wisconsin Supreme Court concluded that a comprehensive general liability insurer is not obligated to defend or provide coverage in a situation where federal and state agencies are demanding that the insured conduct an environmental cleanup, unless there is an actual "suit seeking damages." ***Edgerton***, 184 Wis.2d at 786, 517 N.W.2d at 479. The policy language at issue in ***Edgerton*** provided:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
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> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend *any suit against the insured seeking damages* on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Id. at 769-70, 517 N.W.2d at 472 (emphasis in original). The court's opinion discusses at length both the definition of "suit" and the definition of "damages" as used in the CGL policies. ***Id.*** at 766-86, 517 N.W.2d at 471-79. The court held that a suit is:

> [A]ny proceeding by one person or persons against another or others <u>in a court of law</u> in which the plaintiff pursues, <u>in such court</u>, the remedy which the law affords him for the

> redress of an injury or the enforcement of a right, whether at law or equity.

Id. at 774, 517 N.W.2d at 474 (quotation marks and quoted source omitted; emphasis in original). The key factor is whether the parties to the action are involved in "actual court proceedings, initiated by the filing of a complaint." ***Id.*** at 775, 517 N.W.2d at 474.

Based on ***Edgerton*** and the similar policy language with respect to both Wausau's and Northwestern National's policies requiring the existence of a "suit" before the duty to defend is triggered, we concluded that the trial court properly granted summary judgment to Wausau and Northwestern National. None of the sites allegedly covered by Wausau or Northwestern National involved a "suit" as that term had been defined by ***Edgerton***. Similarly, we concluded that the duty to defend is not triggered regarding the sites allegedly covered by Sentry and Allstate that did not involve a lawsuit; i.e., Thermo-Chem, Four County Landfill, and Grand Haven.[7] The supreme court's recent pronouncement in ***General Casualty v. Hills*** does not affect this portion of our decision. Accordingly, the summary judgment granted to Wausau and Northwestern

[7] We rejected Trostel's argument that an EPA order under § 106(e) of CERCLA should be considered a "suit." An EPA order, without an accompanying court proceeding to enforce the order, does not satisfy ***Edgerton's*** definition of a suit. *See* ***id.*** at 778-81, 517 N.W.2d at 476-77.

National is affirmed in its entirety and the summary judgment granted to Sentry and Allstate is affirmed in part with respect to the non-suit sites referenced above.[8]

That leaves us with determining whether Allstate and Sentry were obligated to defend Trostel with respect to the lawsuits arising from the remaining four sites—West KL, Berlin & Farro, A-1 and Sunrise. Thus, we must examine the complaints in the lawsuits with respect to these four sites to determine whether "damages" are sought.

Edgerton defined damages as that term is used in insurance policies to mean "legal damages" and specifically held that "[r]esponse costs assigned either under CERCLA or [state statutes] are, by definition, considered to be equitable relief." ***Id.*** at 784, 517 N.W.2d at 478. The court concluded that "as an equitable form of relief, response costs were not designed to compensate for past wrongs; rather, they were intended to deter any future contamination by means of injunctive action, while providing for remediation and cleanup of the affected site." ***Id.*** at 785, 517 N.W.2d at 478. Hence, the court held that this type of damage did not constitute "legal damages" and, therefore, was not covered under the policies. ***Id.***

Our supreme court offered additional guidance in answering the "damages" question in ***Hills***. In ***Hills***, the EPA filed a federal lawsuit against

[8] Trostel also argued that Wausau's excess insurance policy should apply even if its underlying policies do not because the excess policy contains language that triggers coverage. Trostel made the same argument with respect to Sentry's umbrella polices. We declined to address this argument in our first opinion because Trostel made this argument for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court will generally not review issue raised for the first time on appeal). Upon reconsideration, we again see no reason to address this issue. *See* ***Trostel v. Employers Ins. of Wausau***, No. 95-1531, unpublished slip op. (Wis. Ct. App. May 7, 1996) (Schudson, J., concurring).

Arrowhead and other potentially responsible parties seeking declaratory relief and recovery of response costs relative to a contaminated site operated by Arrowhead. *See* ***id.*** at 172, 561 N.W.2d at 721. Arrowhead, in turn, filed a third-party complaint against Hills seeking recovery for response costs associated with the site. *See* ***id.*** Hills submitted the complaint to its general liability insurer, General Casualty, requesting insurance coverage. General Casualty filed a declaratory judgment action, requesting the trial court to determine that General Casualty had no duty to defend or indemnify Hills in the third-party action. *See* ***id.*** at 173, 561 N.W.2d at 721. The trial court granted the motion, based on ***Edgerton***. *See* ***Hills***, 209 Wis.2d at 174, 561 N.W.2d at 721. The court of appeals reversed, concluding that because parties other than a federal or state agency were seeking monetary compensation for contamination the insured allegedly inflicted on non-owned property, the action was a suit seeking damages under the policies at issue. *See* ***id.*** at 170-71, 561 N.W.2d at 720. In addressing whether the lawsuit did involve "damages," the supreme court held that "in order to determine whether an action seeks 'damages,' we must consider the nature of the relief being sought–whether it is remedial, substitutionary relief that is intended to compensate for past wrongs, or preventive and focusing on future conduct." ***Id.*** at 180, 561 N.W.2d at 724.

In applying this definition, the supreme court set forth three factors it considered pertinent to determining whether ***Edgerton*** controlled or was distinguishable from the facts at issue in ***Hills***: (1) whether a federal or state agency has requested or directed the insured to develop a remediation plan or incur remediation and response costs under CERCLA or an equivalent state statute; (2) whether the contaminated property fits within the owned-property exclusion in the insurance policies; and (3) whether the insured is being sued to comply with an injunction. *See* ***id.*** The supreme court concluded that none of

these three factors was present in ***Hills***. Rather, Arrowhead filed a third-party complaint against Hills seeking substitutionary, monetary relief to compensate for losses Arrowhead may incur. *See* ***id.*** at 180-81, 561 N.W.2d at 724. Therefore, the supreme court concluded that the suit at issue did constitute a suit for damages and, as a result, General Casualty was obligated to defend Hills. ***Id.***

Given this guidance, we look to each of the four sites that involved lawsuits in the instant case to determine whether "damages" were alleged as that term is used in the insurance policies at issue here. We note that the policy language at issue in ***Hills*** was identical or substantially similar to the policy language involved in this case.

1. West KL site.

In September 1992, the United States, at the request of the EPA, filed suit in the United States District Court for the Western District of Michigan against the Upjohn Company, Kalamazoo County, Charter Township of Oshtemo, and the City of Kalamazoo. The lawsuit sought injunctive relief and recovery of costs brought pursuant to Sections 106 and 107 of CERCLA. It also sought to recover response costs incurred for remedial and investigation activities undertaken in connection with a contaminated landfill at the West KL site. The defendants in this lawsuit subsequently filed a third-party complaint against Eagle Ottawa and hundreds of other parties seeking to recover the costs which they have incurred and will incur in performing the remediation ordered at the site by the United States and in reimbursing the United States for the costs expended in connection with the site. Trostel notified its insurers, but the insurers declined to defend the case. Trostel hired its own attorney to defend the lawsuit, which was ultimately settled.

In determining whether this lawsuit involved "damages," we consider the factors provided in ***Hills***. Like Hills, the insured in the instant case, Trostel, was not directed by the EPA or DNR to develop a remediation plan; Trostel was not the owner of the property; and Trostel was not being sued to comply with an injunction. Moreover, as was the case with Hills, a third party sued Trostel to recover "substitutionary, monetary relief to compensate for the losses" incurred. *See* ***id.*** at 181, 561 N.W.2d at 724. Based on this analysis, we conclude that the lawsuit pertaining to the West KL site is one seeking "damages" as that term is used in the insurance policies at issue. Accordingly, the West KL site is governed by ***Hills***, and ***Edgerton*** did not relieve Sentry or Allstate of their duty to defend Trostel. Accordingly, the trial court erred when it granted Sentry and Allstate's motion for summary judgment with respect to the West KL site. We reverse that portion of the judgment and remand for further proceedings consistent with this opinion.

2. Berlin & Farro, A-1 and Sunrise sites.

The three remaining sites that involved lawsuits can be grouped together because they do not involve a situation similar to the West KL site. Rather, each of these three sites involved a suit brought by or on behalf of a government agency seeking either reimbursement of remediation costs incurred by the agency under state or federal statutes or imposition on the insured of a remediation plan. Trostel was sued directly by the government agency. Under circumstances where a government agency is suing the insured directly to recover costs associated with remediation or to impose a remediation plan, these insurance policies do not provide coverage. *See* ***Regent Ins. Co. v. City of Manitowoc***, 205 Wis.2d 450, 462-63, 556 N.W.2d 405, 409 (Ct. App. 1996). The supreme court reaffirmed this principle in ***Hills*** when it held that a lawsuit involves damages

sufficient to trigger an insurer's duty to defend where "parties other than the EPA and DNR are seeking compensatory, monetary relief for losses they may incur due to [the insured's] alleged past contamination of property that does not fit within the policies' owned-property exclusion." *See* ***Hills***, 209 Wis.2d at 185, 561 N.W.2d at 726. Because these three sites do not involve lawsuits by a non-governmental agency to recover money a third party has spent or will spend because of the insured's contamination of property not owned, leased or controlled, the actions are not "suits for damages." Therefore, we conclude that the trial court did not err when it granted summary judgment to the insurers regarding these three sites, and that portion of the summary judgment is affirmed.[9]

B. Duty to Defend/Defense Costs.

Trostel also claims the insurers breached their duty to defend and, therefore, each insurer has waived the right to contest coverage. This is true only with respect to Allstate and Sentry and is limited to the West KL lawsuit. Allstate and Sentry's duty to defend was not triggered with respect to the remaining sites that they allegedly insured. Similarly, Wausau and Northwestern National's duty to defend was never triggered.

[9] We express some reservations about applying a principle where insurance coverage is determined in part by the nature of the party that is suing the insured. The supreme court's decision in ***General Casualty Co. v. Hills***, 209 Wis.2d 167, 561 N.W.2d 718 (1997) holds that where an independent third party is suing the insured for "substitutionary" damages, the insurer is obligated to defend, but if the EPA or DNR is suing the insured, the duty to defend is not triggered. *See* ***id.*** at 185, 561 N.W.2d at 726. This principle may be better expressed as a factor of the type of damages different types of parties seek–i.e., a private party seeks monetary damages and a government agency seeks a remediation plan or preventive damages. We are not comfortable with the opaque analysis that currently exists in this area. Nonetheless, we are bound by the precedential decisions relied on in the text of this opinion.

When an insurer wrongfully refuses to defend an insured based on its belief that the policy does not provide coverage for the claim, the insurer has breached the contract and is liable to the insured for all the damages that naturally flow from the breach. *See* ***Newhouse v. Citizens Sec. Mut. Ins. Co.***, 176 Wis.2d 824, 837, 501 N.W.2d 1, 6 (1993). Further, an insurer who wrongfully refuses to defend is "estopped from raising any challenges to coverage." ***Grube v. Daun***, 173 Wis.2d 30, 74, 496 N.W.2d 106, 123 (Ct. App. 1992).

Because the third-party complaint in the lawsuit relating to the West KL site alleges facts that if proven "would give rise to the possibility of recovery that falls under the terms and conditions of [Allstate's and Sentry's] insurance policy," *see* ***Hills***, 209 Wis.2d at 176, 561 N.W.2d at 722 (quote marks and quoted source omitted), these insurers had a duty to defend. Allstate and Sentry breached that duty, forcing Trostel to litigate the defense at its own cost. As a result, Trostel suffered damages in the form of payment to settle the West KL claim and defense costs. Because of their breach, Allstate and Sentry are obligated to pay for these damages. This case is remanded to the trial court with instructions for the trial court to conduct a hearing to determine the proper amount that the insurers must pay Trostel.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.